

² 5 U.S.C. § 8101 *et seq.*

On appeal, counsel contends that OWCP's decision is contrary to fact and law.

FACTUAL HISTORY

On December 5, 2006 appellant, a 38-year-old city carrier, filed a traumatic injury claim (Form CA-1) alleging an injury on December 2, 2006 as a result of falling on ice while delivering mail. OWCP accepted the claim for sprain of left shoulder and upper arm, sprain of left hip and thigh, lumbar sprain, lumbar disc herniation at L4-5, and spinal stenosis at L5-S1.³ Appellant received wage-loss compensation and medical benefits and returned to full-time, limited-duty work on March 2, 2009. She returned to full-time, full-duty work on August 10, 2009. OWCP accepted that appellant sustained a recurrence of total disability on June 1, 2010 and May 1, 2013 and authorized spinal surgery, which she underwent on August 31, 2010.⁴ Appellant returned to a full-time, limited-duty position as a letter carrier, effective April 15, 2013, with the following restrictions: lifting and carrying no more than 20 pounds.

On December 11, 2012 appellant, through counsel, filed a claim for a schedule award (Form CA-7). She submitted an October 9, 2012 report from Dr. Neil Allen, a Board-certified neurologist, who opined that she had 15 percent whole person impairment based on Chapter 17 of the sixth edition of the American Medical Association, *Guides to the Evaluation of Permanent Impairment* (hereinafter, A.M.A., *Guides*).

In a December 13, 2012 report Dr. David L. Spencer, a Board-certified orthopedic surgeon, noted that appellant was doing well until December 11, 2012 when she was sitting on a stool at work and the leg broke causing her to fall flat on her buttocks. He found that range-of-motion testing of the lumbar spine was limited and painful and opined that she sustained a contusion to her spine. Dr. Spencer recommended a course of steroid treatment and took appellant off work for two weeks. On December 27, 2012 he reported that she had not improved sufficiently to return to work and therefore he was recommending no work and physical therapy for three to four weeks.

On January 24, 2013 Dr. Avi J. Bernstein, a Board-certified orthopedic surgeon, reported that appellant was pursuing physical therapy and he was releasing her to return to work on January 28, 2013 with a 20-pound lifting restriction. On February 21, 2013 he noted that she continued to complain of right leg symptoms. Dr. Bernstein indicated that appellant had been seen by a Dr. Wolf in the past and had a negative electromyography (EMG). He referred her to pain management for evaluation of possible spinal cord stimulator.

³ In a February 28, 2013 letter, OWCP advised appellant that it had combined her claims under File Nos. xxxxxx958, xxxxxx741, and xxxxxx056 under master File No. xxxxxx668 for administrative case management purposes.

⁴ On October 13, 2011 appellant filed a notice of recurrence (Form CA-2a) alleging that on October 5, 2011 she sustained a recurrence of her October 5, 2011 employment injury. By decisions dated December 13, 2011, March 8, and September 20, 2012, OWCP denied her recurrence claim because the medical evidence of record was insufficient to establish a recurrence of her medical condition commencing October 5, 2011 causally related to her October 5, 2011 work injury.

In a January 14, 2013 report,⁵ Dr. Christopher Gross, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the medical evidence of record and found that after Dr. Allen's October 9, 2012 impairment rating appellant fell at work on December 11, 2012. Appellant was placed on a course of steroids and sent home from work for two weeks. Dr. Gross concluded that appellant was no longer at maximum medical improvement (MMI) and therefore he could not provide a permanent impairment rating. He noted that there was no evidence to suggest any impairment to appellant's right lower extremity. Dr. Gross reported that once Dr. Spencer cleared her to go back to work, and documented her physical examination, he would be able to provide an impairment rating for the accepted lumbar conditions.

By letter dated May 1, 2013, OWCP requested additional information from appellant's treating physician for further consideration to be given to her claim for a schedule award. It stated that its medical adviser was unable to provide an impairment rating on January 14, 2013 because she was no longer at MMI as she fell at work on December 11, 2012, received medical treatment, and was taken off work. OWCP afforded appellant 30 days to submit additional medical evidence, including a physician's report assessing her permanent impairment based on the sixth edition of the A.M.A., *Guides* and establishing that she had reached MMI.

In response, appellant submitted reports dated March 21 through April 30, 2013 from Dr. Richard Noren, a Board-certified anesthesiologist, who diagnosed bilateral sacroiliac (SI) joint dysfunction and administered steroid injections.

In a June 10, 2013 letter, OWCP advised appellant that because the medical evidence of record indicated that she had not yet reached MMI that her schedule award claim could not be considered.

On March 24, 2014 appellant, through counsel, filed a second claim for a schedule award (Form CA-7) and submitted an August 29, 2013 functional capacity evaluation and a July 23, 2013 EMG and nerve conduction velocity (NCV) study, which was normal and demonstrated no evidence of a lumbar radiculopathy. Appellant further submitted reports dated June 28 through September 5, 2013 from Dr. April Fetzer, a Board-certified physiatrist, who diagnosed chronic low back pain with left lumbar radiculopathy status post L4 through S1 fusion. On July 29, 2013 Dr. Fetzer opined that appellant had reached MMI and released her to full-duty work.

In a July 3, 2014 letter, OWCP advised appellant of the deficiencies of her schedule award claim and afforded her 30 days to submit a physician's report establishing that she had reached MMI and a permanent impairment rating based on the sixth edition of the A.M.A., *Guides*.

In a July 14, 2014 report, Dr. Bernstein noted that appellant sustained a fall at work on May 9, 2014 and another fall at work on July 5, 2014 when she rolled her left ankle. Appellant also reported increasing low back pain radiating down her right leg since the incident. Dr. Bernstein diagnosed significant increasing low back pain and provided restrictions of lifting no more than 10 pounds.

⁵ The Board notes that the report date "January 14, 2012" is a harmless, typographical error.

On July 22, 2014 Dr. Jeffrey L. Visotsky, a Board-certified orthopedic surgeon, diagnosed lateral epicondylitis and extensor carpi radialis brevis origin tear. On August 20, 2014 he noted that appellant was seen for a follow-up of a left lateral epicondylectomy and was to maintain an off-work status.

By decision dated September 24, 2014, OWCP terminated appellant's wage-loss compensation benefits as her actual earnings as a modified letter carrier exceeded the current wages of her date-of-injury position.

On November 26, 2014 Dr. Michael Hellman, a Board-certified orthopedic surgeon and OWCP medical adviser, reviewed the medical evidence of record and concluded that appellant had reached MMI on July 29, 2013, the date Dr. Fetzer released appellant to full duty. He found that appellant's shoulder and hip sprains had fully resolved and therefore she had no permanent impairment of the left upper or lower extremity under the A.M.A., *Guides*. Utilizing section 16.4, page 531, of the A.M.A., *Guides* and the July/August 2009, *The Guides Newsletter*, Dr. Hellman performed an impairment rating of her left and right lower extremities as related to her lumbar spine condition. He found that Dr. Fetzer's July 29, 2013 and Dr. Bernstein's July 14, 2014 report both indicated that appellant had no sensory or motor deficits. Dr. Hellman explained that he disagreed with Dr. Allen's impairment rating because his assessment was improperly based on Chapter 17 of the A.M.A., *Guides* and failed to properly utilize the July/August 2009, *The Guides Newsletter*. He noted that appellant had some recent injuries that were not reflected under the current claim. Appellant fell at work on May 9, 2014, rolled her left ankle on July 5, 2014, was diagnosed with epicondylitis and underwent surgery on July 24, 2014. Dr. Hellman explained that he could not evaluate her permanent impairment related to these injuries as she had not reached MMI for these conditions.

By decision dated February 12, 2015, OWCP denied appellant's schedule award claim finding that the medical evidence of record failed to establish a ratable impairment as required to obtain a scheduled member.⁶

On February 18, 2015 counsel requested an oral hearing before a representative of the Branch of Hearings and Review. Appellant submitted physical therapy reports dated February 12 through April 14, 2015.

In a February 9, 2015 report, Dr. Bernstein noted that "on Tuesday, [appellant] tweaked her back delivering mail" and suffered right-sided buttock pain to knee and questioned whether she had SI joint dysfunction. On March 12, 2015 he noted that appellant continued to have pain in the SI joint, but felt that she was capable of getting back to work and would continue with physical therapy. On March 19, 2015 Dr. Bernstein diagnosed low back pain and SI joint pain and recommended an injection for the SI joint pain. On June 4, 2015 he found continued symptoms and reported that he was trying to obtain a magnetic resonance imaging scan.

⁶ On February 9, 2015 appellant, through counsel, filed a claim for a recurrence of disability (Form CA-2a). In a March 19, 2015 letter, OWCP advised appellant that, based on her description of the circumstances that prompted the filing of the claim, she was claiming a new traumatic injury, and therefore should file a new traumatic injury claim.

A telephonic oral hearing was held before an OWCP hearing representative on September 3, 2015. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence.

Subsequently, appellant submitted an August 14, 2015 narrative statement indicating that she was at home due to SI joint dysfunction and a physical therapy report dated August 19, 2015. She further submitted an August 31, 2015 report from Dr. Bernstein who noted that she had some improvement with her SI joint injection, which was starting to wear off and still she considered the SI joint a problem. Dr. Bernstein recommended an updated injection and continued physical therapy.

By decision dated November 23, 2015, OWCP's hearing representative affirmed the February 12, 2015 schedule award decision.

LEGAL PRECEDENT

The schedule award provision of FECA,⁷ and its implementing federal regulations,⁸ set forth the number of weeks of compensation payable to employees sustaining permanent impairment from loss, or loss of use, of scheduled members or functions of the body. However, FECA does not specify the manner in which the percentage of loss shall be determined. For consistent results and to ensure equal justice under the law for all claimants, OWCP has adopted the A.M.A., *Guides* as the uniform standard applicable to all claimants.⁹ As of May 1, 2009, the sixth edition of the A.M.A., *Guides* is used to calculate schedule awards.¹⁰

Neither FECA nor its regulations provide for a schedule award for impairment to the back or to the body as a whole.¹¹ Furthermore, the back is specifically excluded from the definition of organ under FECA.¹² The sixth edition of the A.M.A., *Guides* does not provide a separate mechanism for rating spinal nerve injuries as impairments of the extremities. Recognizing that FECA allows ratings for extremities and precludes ratings for the spine, the July/August 2009, *The Guides Newsletter* offers an approach to rating spinal nerve impairments consistent with sixth edition methodology. For peripheral nerve impairments to the upper or lower extremities resulting from spinal injuries, OWCP procedures indicate that *The Guides Newsletter* is to be applied.¹³

⁷ 5 U.S.C. § 8107.

⁸ 20 C.F.R. § 10.404.

⁹ *Id.* at § 10.404(a).

¹⁰ Federal (FECA) Procedure Manual, Part 2 -- Claims, *Schedule Awards and Permanent Disability Claims*, Chapter 2.808.5(a) (February 2013); *see also* Part 3 -- Medical, *Schedule Awards*, Chapter 3.700.2 and Exhibit 1 (January 2010).

¹¹ *See N.D.*, 59 ECAB 344 (2008); *Tania R. Keka*, 55 ECAB 354 (2004).

¹² *See* 5 U.S.C. § 8101(19); *Francesco C. Veneziani*, 48 ECAB 572 (1997).

¹³ *Supra* note 10 at Chapter 3.700 (January 2010). *The Guides Newsletter* is included as Exhibit 4.

A schedule award can be paid only for a condition related to an employment injury. The claimant has the burden of proving that the condition for which a schedule award is sought is causally related to his or her employment.¹⁴

ANALYSIS

The Board finds that the medical evidence of record fails to establish that appellant sustained any permanent impairment to a scheduled member of the body causally related to the December 2, 2006 employment injury. OWCP accepted her claim for sprain of left shoulder and upper arm, sprain of left hip and thigh, lumbar sprain, lumbar disc herniation at L4-5, and spinal stenosis at L5. The medical evidence of record does not establish that appellant sustained a permanent impairment due to any of her accepted conditions.

The Board finds that OWCP's medical adviser, Dr. Hellman, properly reviewed the medical record and found no basis for rating impairment to a scheduled member of the body.¹⁵ Dr. Hellman found that appellant's shoulder and hip sprains had fully resolved and that therefore she had no permanent impairment of the left upper or lower extremity under the A.M.A., *Guides*. Utilizing section 16.4, page 531, of the A.M.A., *Guides* and the July/August 2009, *The Guides Newsletter*, utilizing the treating physician's reports he performed an impairment rating of her left and right lower extremities as related to her lumbar spine condition. Dr. Hellman found that Dr. Fetzer's July 29, 2013 and Dr. Bernstein's July 14, 2014 report both indicated that appellant had no sensory or motor deficits. Moreover, the Board notes that the EMG/NCV study dated July 23, 2013 was normal and demonstrated no evidence of a lumbar radiculopathy. Dr. Hellman explained that he disagreed with Dr. Allen's impairment rating because his assessment was improperly based on Chapter 17 of the A.M.A., *Guides* and failed to properly utilize the July/August 2009, *The Guides Newsletter*. He noted that appellant had some recent injuries that were not reflected under the current claim. Dr. Hellman explained that he could not evaluate her permanent impairment related to her later injuries as she had not reached MMI for these conditions. He determined that appellant had reached MMI as of July 29, 2013, the date Dr. Fetzer released her to full duty. The Board finds that OWCP's medical adviser properly concluded that record of evidence contains no medical evidence of impairment to the left upper extremity or bilateral lower extremities resulting from the accepted conditions. Therefore, appellant has not met her burden of proof to establish permanent impairment under the sixth edition of the A.M.A., *Guides* for any of her accepted conditions.

FECA does not authorize schedule awards for loss of use of the spine.¹⁶ A claimant may still receive an award for loss of use of a limb where the cause of the impairment originated in the spine. Because the A.M.A., *Guides* does not provide a separate mechanism for rating spinal

¹⁴ See *Veronica Williams*, 56 ECAB 367 (2005).

¹⁵ The Board notes that it is appropriate for an OWCP medical adviser to review the clinical findings of the examining physician to determine the permanent impairment. See *supra* note 10, Part 3 -- Medical, *OWCP Directed Medical Examinations*, Chapter 3.200.4 (October 1990); *Tommy R. Martin*, 56 ECAB 273 (2005).

¹⁶ See *M.R.*, Docket No. 14-0833 (issued September 9, 2014).

nerve injuries as impairments of the extremities, OWCP has adopted the standard set forth in *The Guides Newsletter*.¹⁷

In his October 9, 2012 report, Dr. Allen opined that appellant had 15 percent whole person impairment based on Chapter 17 of the sixth edition of the A.M.A., *Guides*. Chapter 17 addresses whole person impairment of the spine, not upper extremity impairment¹⁸ and thus he is found to have failed to utilize the proper standard. The Board finds that his impairment rating is inconsistent with FECA and the A.M.A., *Guides*. Appellant has submitted no other current medical evidence in conformance with the sixth edition of the A.M.A., *Guides*, or *The Guides Newsletter*, addressing how she has a ratable impairment of a scheduled body member. Accordingly, the weight of the medical opinion evidence is accorded to Dr. Hellman's November 26, 2014 report. Consequently, appellant failed to establish that she has a ratable impairment of a scheduled body member.¹⁹

On appeal, counsel contends that OWCP's decision is contrary to fact and law. Based on the findings and reasons set forth above, the Board finds that appellant's arguments are not substantiated.

Appellant may request a schedule award or increased schedule award at any time based on evidence of a new exposure or medical evidence showing progression of an employment-related condition resulting in permanent impairment or increased impairment.

CONCLUSION

The Board finds that appellant has not met her burden of proof to establish a schedule award.

¹⁷ See *supra* note 13.

¹⁸ See *L.T.*, Docket No. 15-423 (issued March 26, 2015). See *supra* note 11.

¹⁹ *Id.* See *J.Q.*, 59 ECAB 366 (2008) (when the examining physician does not provide an estimate of impairment that conforms to the A.M.A., *Guides*, OWCP may rely on the impairment rating provided by an OWCP medical adviser).

ORDER

IT IS HEREBY ORDERED THAT the November 23, 2015 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: March 1, 2017
Washington, DC

Christopher J. Godfrey, Chief Judge
Employees' Compensation Appeals Board

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board